

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1245

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

VANKIRK MOORE AND HAROLD BURNELL,

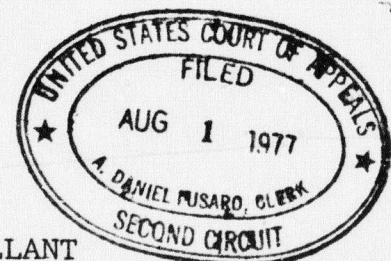
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
VANKIRK MOORE

DAVID BLACKSTONE
401 BROADWAY
NEW YORK, N. Y. 10013
TEL. 226-6684

ATTORNEY FOR DEFENDANT-APPELLANT
VANKIRK MOORE



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

VANKIRK MOORE AND HAROLD BURNELL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
VANKIRK MOORE

DAVID BLACKSTONE
401 BROADWAY
NEW YORK, N. Y. 10013
TEL. 226-6684

ATTORNEY FOR DEFENDANT-APPELLANT
VANKIRK MOORE

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	1
INTRODUCTION.....	2
FACTS.....	3
ARGUMENT.....	10
The provision of § 1201 (b) of the Federal Kidnapping Statute that presumes the victim's transportation in interstate or foreign commerce, which is an element of the federal offense, from the fact of the victim's non release within 24 hours after his abduction is irrational and arbitrary and hence unconstitutional under the test of <i>Leary v. United States</i>, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). Consequently, the guilty counts of kidnapping and conspiracy to commit kidnapping must be vacated as they are predicated on the application of § 1201 (b).	
CONCLUSION.....	20

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1245

- - - - -x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

VANKIRK MOORE AND HAROLD BURNELL,

Defendants-Appellants.

- - - - -x

PRELIMINARY STATEMENT

Vankirk Moore appeals from a judgment of the United States District Court for the Southern District of New York, Vincent J. Broderick, judge, convicting him and Harold Burnell after a jury verdict of both conspiracy to commit kidnapping and kidnapping, Title 18 U.S.C. § 1201 (c), 1201 (a) and 2, and of conspiracy to extort a ransom through the use of interstate commerce facilities, Title 18 U.S.C. §§ 371, 875 (a), and 1952 (a) and (b), and transmitting in interstate commerce a ransom demand for the release of a kidnapped person, Title 18 U.S.C. § 875 (a).

On April 22, 1977, the appellant was sentenced to life imprisonment on the kidnapping count

and ten years on the kidnapping conspiracy count. He also received five years on each of the other two guilty counts. All sentences are to run concurrently with each other.

On May 23, 1977, David Blackstone was assigned to represent Mr. Moore on the appeal, relieving Lawrence Hochheiser who served as the defendant's trial counsel.

INTRODUCTION

In this appeal Vankirk Moore attacks the constitutionality of § 1201 (b) of the federal kidnapping statute which presumes the victim's transportation in interstate or foreign commerce, an element of the federal offense*, from the fact of the victim's non-release within 24 hours after his abduction.** The argument is that the § 1201 (b) presumption is irrational and arbitrary and hence unconstitutional under the test of *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). Consequently, the guilty counts of kidnapping and

*In pertinent part §1201 (A) of the kidnapping act reads:

"(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when: (1) the person is willfully transported in interstate or foreign commerce; ... shall be punished by imprisonment for any term of years or for life."

**§ 1201 (b) reads: "... the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce."

conspiracy to commit kidnapping must be vacated as they are predicated on the application of § 1201 (b).

FACTS

On December 1, 1976, Buster Huggins ["Buster"] vanished and never returned. Portrayed by the government illicitly as a local drug pusher and licitly as the owner-manager of H & S Transmissions, a Manhattan auto body shop, Buster on the day in question was last seen leaving his mistress's Harlem apartment. Later that evening his kidnapping became known by a telephone call and tied to a \$250,000 ransom.

The extortionate demands were communicated in a series of telephone calls to Martha Wigfall, one of Buster's paramours residing in Manhattan and to Buster's parents at their home in Charleston, South Carolina.

On the morning of December 2, 1976, Ricki Huggins, one of Buster's brothers, listened in with Martha Wigfall to an extortionate call and identified Harold Burnell as the speaker at the other end. [Tr. 136, 947-949]* Harold Burnell was well known to Ricki Huggins and many others who testified as one of Buster's employees at his auto body shop. [Tr. 128, 644] Thus because of Ricki Huggins's revelation, the FBI immediately targeted Harold Burnell when they entered the investigation on December 2, 1976.

*References are to the trial record.

On December 3, 1976, the kidnappers turned down Martha Wigfall's offer of \$50,000 and gave her more time to meet the ransom. [Tr. 140] On December 4, 1976, the kidnappers again made telephone contact with Martha Wigfall and she informed them that \$100,000 had been raised. They directed her to bring the money to the Korvettes Shopping Center in the Bronx where at a designated public telephone she would be contacted again. [Tr. 148-150] Martha Wigfall proceeded to Korvettes, closely followed by the FBI, and made the telephone contact. Her instructions were to drop the money in a certain garbage container at Rocky Point Lookout in the Palisades, New Jersey and then to return to the Korvettes contact phone for word of Buster's whereabouts. [Tr. 152-153] As Wigfall spoke on the telephone to the extortioner, FBI agents in another area of the Korvettes Shopping Center spied Harold Burnell at the wheel of his car and parked near a public telephone. On this telephone, apparently in conversation, was Vankirk Moore. [Tr. 955] It was at this juncture that Burnell and Moore were placed under arrest for kidnapping. Though the FBI subsequently developed additional evidence to connect the defendants to the crime, no trace of Buster's whereabouts has ever been uncovered.

Viewing the evidence in the light most favorable to the government, a reasonable jury could find Vankirk Moore's participation in Buster's kidnapping mainly from the voice identifications. On December 2, 1976, the FBI placed a recording device on Martha Wigfall's home phone and a day later on Buster's business phone at H & S Transmissions. [Tr. 138, 144] On December 3 and 4 a series of extortionate calls from two individuals came in on these lines and were recorded. [Tr. 140, 146-149] Three government witnesses for whom the recordings were played testified that they knew Vankirk Moore's voice very well and that he was one of the speaking extortioners. These witnesses were Glen Huggins, who is Buster's younger brother, Robert Clement, an employee at H & S Transmissions, and Kissoon Adams, an associate of Vankirk Moore and Harold Burnell.* [Tr. 804, 646-647, 374]

Also, two post arrest seizures contributed substantially to the government's case against Vankirk Moore. A business card found in Moore's possession following his arrest was marked with telephone numbers that matched those of the public telephones at the Korvettes Shopping Center, including the contact phone used by Martha Wigfall. [Tr. 1327, 1330] Additionally,

*These identifications were challenged by Vankirk Moore's parents, testifying for the defense that the questioned voice was not that of their son. [Tr. 1554, 1640]

Buster's key ring and keys were seized at Vankirk Moore's Manhattan apartment. [Tr. 158, 1381]

SUFFICIENCY OF THE EVIDENCE OF
BUSTER'S TRANSPORTATION IN INTER-
STATE OR FOREIGN COMMERCE.

Probative of Buster's out-of-state transportation was merely a declaration of design attributed to Harold Burnell from which the argument is made that the act was probably done as planned. Specifically, Mary Burch, who maintained a common law marriage relationship with Harold Burnell, testified that sometime between November 7 and November 14, 1976, Harold Burnell told her that Vankirk Moore intended to "rip off" Buster and "probably" have him taken out of the states where he would not be found.* [Tr. 346-349] While Burch maintained in her trial

*The trial testimony of Mary Burch went as follows:

Q Would you tell us what Mr. Burnell said to you and what you said to Mr. Burnell?

A Harold said that Tico [Vankirk Moore] was planning to -- MR. HOCHHEISER: Objection, your Honor.

THE COURT: Overruled.

Q You may continue, Miss Burch.

A Planning to have Buster ripped off because Buster had ripped off three Rastafarians.

Q Did you ask Mr. Burnell what "ripped off" meant?

A No.

Q Did he tell you?

A No.

Q Was there anything else to the discussion?

A And that only three people knew about it, him --

Q Him, Harold?

A Yes.

-- Tico and Kojak. [Kissoon Adams]

Q Who is Kojak?

testimony that Burnell said he would have nothing to do with it and would be at his job at the time of the crime's occurrence, in the grand jury, she testified to Burnell's admission that he would receive one half of the crime's proceeds. [Tr. 521]

MR. HOCHHEISER: I have an objection, your Honor, to the reference to Tico.

THE COURT: Overruled.

Q Who is Kojak?

A A friend of theirs.

Q Was there any discussion about what they would do once Buster was ripped off?

MR. THAU: Objection to leading. Perhaps the witness might be asked to tell us all about what was said.

Q Will you tell us everything you remember about that conversation? Start at the beginning and go through it as best as you can recall.

A Harold said that Tico was planning to have Buster ripped off because Buster had ripped off three Rastafarians and that only three of them knew about it, Tico, Kojak and Harold, and that --

MR. HOCHHEISER: Judge, I won't object to any further hearsay. I just have a standing objection to anything she claims Mr. Burnell said about Tico and then --

THE COURT: I take it that this is being offered subject to connection.

MR. KAPLAN: Correct, your Honor.

Q Miss Burch, would you continue, please.

A And that Kojak was messing around and that Tico was thinking of ripping him off, also, and that they would -- that Harold wouldn't have anything to do with it, that he would go to the garage to work every day just like he always did, and they would hold Buster for money because Buster had a lot of money, and that Tico was having someone take care of everything, that they would probably take him out of states.

Q Was there anything else said about taking Buster out of the states?

A They would probably take him out of the states where he would never be found.

Q Where he would never be found?

A Yes.

Q Was there any discussion about how the money would be divided?

A Just that they would divide the money, that's all.

Before the foregoing testimony came out, Mr. Hochheiser sought its exclusion as hearsay. The government argued two theories of admissibility - as a coconspirator declaration, admissible under Rule 801 (d)(2)(E) of the Federal Rules of Evidence* and as state of mind, admissible under Rule 803 (3)** - and cited *United States v. Annunziato*, 293 F2d 373 (2nd Cir. 1961) in support of both positions. Mr. Hochheiser countered with argument that Moore's statement had been uttered as confidential "pillow talk" that in no way furthered the conspiracy. The government responded with argument that Burnell's statement had been made to secure the integrity of his alibi. Thus if anything went amiss, Mary Burch would know how to cover for him. Judge Broderick found *United States v. Annunziato*, *supra*. controlling and admitted the statement on both of the grounds advanced by the government. [Tr. 293-308, 314-333]

*Rule 801 (d) in pertinent part reads: "(d) Statements which are not hearsay - a statement is not hearsay if - ... (2) admission by party-opponent - the statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

**Rule 803 in pertinent part reads: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Besides the declaration of design there is the discovery of Buster's car - missing since the kidnapping - at the long-term parking lot at John F. Kennedy Airport on December 23, 1976. [Tr. 1152] Finally, in a December 3, 1976, extortionate call, the speaker - Vankirk Moore - threatens to take Buster "out of town" unless the ransom is paid. [Tr. 142]

The sparcity of the actual evidence of Buster's out-of-state transportation is what probably induced the government to request an instruction on the § 1201 (b) presumption. Judge Broderick granted the request, skirting the troublesome issue of the presumption's constitutionality, charging as follows:

The second element is that one or both of the defendants transported Mr. Huggins in interstate or foreign commerce. It is sufficient on this element that you find beyond a reasonable doubt that one or both of the defendants transported Buster Huggins across State or National lines. It is not necessary to prove that the defendants knew that they were taking the victim across the State or National lines or that they intended to take him from one State to another or from one country to another. It is sufficient if the government proves beyond a reasonable doubt that one or both of the defendants wilfully [sic] and knowingly transported the victim from one point to another and in so doing crossed a State line or a National border.

Now, this transportation of the victim across a State or National line is an essential element of the crime alleged in Count 2, and it must be proved by the government beyond a reasonable doubt.

Under the law, the failure to release a kidnapping victim within 24 hours creates a presumption that the victim has been transported in interstate or foreign commerce, and you may so find. You are not required to so find. This presumption is not conclusive, and it may be refuted or disproved by contrary evidence, and it may simply not be accepted by you as jurors.

In sum, you are to look at all the evidence in this case, not only the presumption that I just mentioned to you but the entirety of the proof before you and decide whether or not the government has proved beyond a reasonable doubt that Buster Huggins was in fact transported in interstate or foreign commerce.

If you conclude that the government has not proved such transportation beyond a reasonable doubt, you must acquit the defendants on Count 2.

[Tr. 2013-2015]

No exception to the instruction was taken.

ARGUMENT

The provision of § 1201 (b) of the Federal Kidnapping Statute that presumes the victim's transportation in interstate or foreign commerce, which is an element of the federal offense, from the fact of the victim's non release within 24 hours after his abduction is irrational and arbitrary and hence unconstitutional under the test of *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). Consequently, the guilty counts of kidnapping and conspiracy to commit kidnapping must be vacated as they are predicated on the application of § 1201 (b).

How long a kidnap victim is gone tells nothing about his whereabouts. Thus at the outset it is obvious

that the presumption of §1201 (b) has no flow in logic at all and proves nothing about whether the victim has been transported in interstate or foreign commerce.

Congress had a twofold purpose in enacting §1201 (b). Since the victim's life may be in jeopardy, one purpose was to avoid any delay in the investigation. Without the presumption, the FBI investigation could stall until evidence arose of the victim's out-of-state transportation. A second purpose was to provide federal assistance to local authority at the investigatory stage. Congress believed that the FBI had greater crime solving capability than the local police and that an immediate nationwide FBI response in kidnapping cases would help save life and serve as a general deterrent. See, S. Rep. No. 2820, 84 Cong., Sess. 2 (1956) reprinted in [1956] U.S. Code Cong. & Ad News 4373-4375.* The Senate report referred to makes it perfectly clear that § 1201 (b) and its precursor were not enacted to broaden prosecutorial jurisdiction to include the purely intrastate kidnapping. Hence, interstate or foreign transportation of the victim remains a material element of the offense which, as in the case of all material

*Kidnapping was enacted into law by the act of June 22, 1932. The rebuttable presumption, predicated upon the failure to release the victim within seven days after the occurrence of the crime appeared in the act of May 18, 1934. Section 1201 (b), reducing the period of the presumption from seven days to 24 hours was enacted in 1956.

elements of all crimes, must be proved beyond reasonable doubt in order to satisfy Fifth Amendment due process. See, *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); *Mullaney v. Wilbur*, 421 U.S. 681, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975).

The Supreme Court has substantially defined the constitutional limitations of the use of presumptions in criminal cases in a series of modern decisions that include, *Tot v. United States*, 319 U.S. 463, 64 S.Ct. 1241, 87 L.Ed. 1519 (1943); *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); *United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); and *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 383 (1973).

In the *Tot** case, in striking down a presumption the court explained the test as follows:

*The court struck down a provision of the Federal Firearms Act making it "unlawful for any person who has been convicted of a crime of violence to receive any firearm ... which has been shipped ... in interstate ... commerce" and providing that possession of a firearm shall be presumptive evidence that the firearm was ... received by such person in violation of the act."

"A statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

318 U.S. at 467-468

Then came the *Gainey* and *Romano* decisions which dealt with presumptions that aided the government in prosecuting liquor cases. In *Gainey*, a prosecution for "carrying on" the business of a distiller, the court sustained the validity of a statute which provided that presence at the site is sufficient to convict a defendant "unless the defendant explains such presence to the satisfaction of the jury." However, in *Romano* the court struck down a similar presumption where the conviction was for illegal "possession" of a still:

"Presence at an operating still is sufficient evidence to prove the charge of 'carrying on' because anyone present at the site is very probably connected with the illegal enterprise. Whatever his job may be, he is at the very least aiding and abetting the substantive crime of carrying on the illegal distilling business. Section 5601(a)(1), however, proscribes possession, custody or control. This is only one of the various aspects of the total undertaking, many of which have nothing at all to do with possession. ... Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate rational

or reasonable inference that he was engaged in one of the supply, delivery or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt - the inference of the one from proof of the other is arbitrary."

382 U.S. at 141

Commentators have noted that the *Romano* opinion left in doubt whether the constitutional standard is met if the basic fact is more likely than not to lead to the presumed fact or whether a "reasonable doubt" standard is required. See, Weinstein, Federal Rules of Evidence, § 303 [02]; *Stubbs v. Smith*, 533 F2d 64 (2nd Cir. 1976). This question remains unanswered to date despite three Supreme Court decisions, *Leary v. United States*, *supra*, *Turner v. United States*, *supra*, and *Barnes v. United States*, *supra*, all dealing with the constitutional validity of criminal presumptions.

In *Leary**:

"The upshot of Tot, Gainey and Romano is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

*The court struck down a presumption that knowledge of illegal importation of marijuana could be inferred from simple possession.

The court added in a footnote:

"Since we find that the §176a presumption is unconstitutional under this standard, we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use. Cf. *United States v. Adams*, 293 F. Supp. 776, 783-784 (1968). See also *United States v. Romano*, supra, at 140-144; Note, 'The Constitutionality of Statutory Criminal Presumption,' 34 U.Chi.Rev. 141 (1966)."

In *Turner*, as to the presumption relating to heroin:

"Whether judged by the more likely than not standard applied in *Leary v. United States* ..., or by the more exacting reasonable doubt standard normally applicable in criminal cases, § 174 [of title 18 of U.S.C.] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug."

396 U.S. at 416

In regard to the cocaine count, the court noted:

"Applying the more likely than not standard employed in *Leary* ..., we cannot be sufficiently sure either that cocaine that Turner possessed came from abroad or that Turner must have known that it did."

396 U.S. at 419

Finally in *Barnes v. United States*, supra, which dealt with the common law inference of guilt from unexplained possession of recently stolen goods, the

court stated:

"... If a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process."

412 U.S. at 843

This court need not decide here which is the correct test inasmuch as the § 1201 (b) presumption fails even under the more lenient more-likely-than-not test.

The government may urge harmless error, claiming that Harold Burnell's declaration to Mary Burch that Vankirk Moore planned to have Buster taken out of the states gave the jury sufficient evidence to find Buster's out-of-state transportation and that by failing to object to the charge, the appellant foreclosed the issue on appeal. Assuming the vitality of this state of mind evidence from the standpoint of admissibility and legal sufficiency, such an argument must nevertheless be rejected pursuant to the doctrine that when a case is submitted to a jury on alternative theories, the unconstitutionality of any one of the theories requires that the conviction be reversed.

Leary v. United States, supra; Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532 (1931). In *Leary* where at trial, Dr. Leary testified to bringing the marijuana from New York across the Mexican border and back again, the government argued that his testimony furnished the jury with sufficient evidence to justify a conviction without regard to the presumption instruction, unobjected to, that mere possession of marijuana was sufficient evidence to infer knowledge of its illegal importation. The court categorically rejected the argument stating:

"The Government contends that by giving testimony at trial which established all elements of the offense under the 'South-North' theory, and by failing to object to the jury instructions on the ground now advanced, petitioner foreclosed himself from raising the point thereafter. We cannot agree. Even assuming that petitioner's testimony did supply all the evidence required for a valid conviction under the 'South-North' theory, the jury nevertheless was told that it could alternatively convict with the aid of the presumption under the 'North-South' theory. For all we know, the conviction did rest on that ground. It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., *Stromberg v. California*, 283 US 359, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484 (1931)"

395 U.S. at 31

THE ADMISSIBILITY AND SUFFICIENCY OF
THE GOVERNMENT'S ACTUAL EVIDENCE OF
BUSTER'S OUT-OF-STATE TRANSPORTATION.

Mary Burch, the common law wife of Harold Burnell, testified that two or three weeks before the kidnapping Burnell told her that Vankirk Moore intended to "rip off" Buster and "probably" arrange for his transportation out of the states where he would not be found. Burnell also said that he would remain at work at the time of the crime and would not participate in it. Yet he indicated some form of complicity by stating that he would receive one half of the crime's proceeds.

Judge Broderick admitted this testimony against Vankirk Moore on two grounds: as coconspirator hearsay and as declaration of design.

In regard to the first sustained ground, Rule 801 (d) (2) (E) admits a statement "by a co-conspirator of a party during the course and in *furtherance* of the conspiracy." Because of the court's suspicion that Harold Burnell made the statement to enlist Mary Burch's tacit support and to obtain as well her complicity in protecting his alibi, the declaration was pigeonholed into the "furtherance" category. This pure speculation is not predicated on any trial testimony or other evidence of any sort. It is mere surmise that

strips the language from the rule that calls for the declaration's being shown to have been made to further or advance the criminal act. Thus the statement should not have been allowed as coconspirator hearsay because there was no actual proof that it had been uttered in furtherance of the conspiracy.

Judge Broderick also admitted the statement under the general rule that declarations of intention are admissible to show the subsequent acts of the *declarant*. *United States v. Annunziato*, 293 F2d 373 (2nd Cir. 1961); McCormick, Evidence (2nd Ed. 1972) § 295. Under this theory, Harold Burnell's statement cannot be admitted to prove Vankirk Moore's future action because Moore is not the *declarant*. McCormick recognized the danger inherent in admitting one declarant's state of mind as proof of another's act and wrote that evidence of design should "be limited to proof of conduct that would not have required the substantial cooperation of persons other than the declarant." McCormick, Evidence (2nd Ed. 1972) p 698.

Even if Harold Burnell's statement is admissible, the substance of what had been stated is too inconclusive and unreliable to establish, absent some form of corroborative evidence, the actual transportation of Buster out of New York State. It is inconclusive because the declarant said the action was being entertained as a "probability"

rather than as a definite course of action. It is unreliable because Burnell was not even expressing a course of action he, himself intended to pursue, but rather, if the statement is to be fully credited, a course of action intended to be pursued by others. In short Burnell's information in regard to the confinement of Buster may well have come to him second-hand.

CONCLUSION

Inasmuch as the evidence is insufficient to support a finding of out-of-state transportation of the victim, the guilty verdicts on the kidnapping count and the conspiracy to commit kidnapping count must be vacated and the indictment dismissed as to those counts. Alternatively, a new trial should be directed as to these counts.

Respectfully submitted,

David Blackstone
401 Broadway
New York, New York 10013
Tel. No. 226-6684

Attorney for Defendant-
Appellant Vankirk Moore

DATED: New York, New York
July 7, 1977.

COPY RECEIVED
JUL 7 1977
ROBERT B. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N.Y.

